

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**BRIAN FRENCH, DAVID FRENCH,
JEANNA FRENCH, PAULA FRENCH
VAN AKKEREN,**

Plaintiffs,

v.

Case No. 06-C-869

**WACHOVIA BANK, NATIONAL
ASSOCIATION,**

Defendant.

DECISION AND ORDER

This case initially consisted of two causes of action, one of which the Court held was arbitrable. Accordingly, on March 21, 2007, the Court stayed this proceeding pending arbitration. However, neither party initiated arbitration. Instead, on July 13, 2007, the plaintiffs moved to amend their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure that allows a party to “amend [its] pleading once as a matter of course at any time before a responsive pleading is served” Fed. R. Civ. P. 15(a). The amended complaint eliminated the arbitrable claim and sought only to litigate the non-arbitrable claim. On October 23, 2007, the Court granted the plaintiffs’ motion to amend their complaint and lifted the stay because the only remaining claim was not arbitrable.

On December 26, 2007, the defendant, Wachovia Bank, National Association (“Wachovia”), filed a second motion to compel arbitration. Wachovia premised that motion on an e-mail in which the plaintiffs’ attorney said that they had not “abandoned” or “waived” the arbitrable claim. On April 23, 2008, the Court denied Wachovia’s second motion to compel arbitration and slated a scheduling conference for June 18, 2008. Subsequently, Wachovia filed a notice of appeal pursuant to 9 U.S.C. § 16(a)(1) challenging the Court’s April 23, 2008 Decision and Order.

Generally, district courts must stay proceedings while appeals are pending that arise from the denial of a motion to compel arbitration. *See Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 505-06 (7th Cir. 1997). Nevertheless, the plaintiffs argue that Wachovia’s appeal is frivolous, which if true, would negate the necessity of issuing a stay. *Id.* at 506. An appeal is “frivolous” when the appellant’s arguments are “utterly meritless and have no conceivable chance of success.” *In re Gulevsky*, 362 F.3d 961, 964 (7th Cir. 2004). While the Court was not persuaded by Wachovia’s arguments, that does not render those arguments “utterly meritless.” Because “it is fundamental to a hierarchical judiciary that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously,” the Court will stay this matter pending Wachovia’s appeal. *Bradford-Scott*, 128 F.3d at 505 (internal quotations omitted).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Plaintiffs' Motion for Order Declaring Defendant's Appeal Frivolous (Docket No. 55) is **DENIED**.

Wachovia's Motion to Stay Proceedings (Docket No. 60) is **GRANTED**.

The clerk is directed to close this case for administrative purposes only.

Dated at Milwaukee, Wisconsin this 16th day of June, 2008.

BY THE COURT

/s/ Rudolph T. Randa

Hon. Rudolph T. Randa
Chief Judge